IN THE

SUPREME COURT

OF THE

UNITED STATES.

THE CREEDE AND CRIPPLE CREEK MINING AND MILLING COMPANY, *Petitioner*, vs. THE UINTA TUNNEL, MINING AND TRANSPORTATION COMPANY, *Respondent*.	219.

Memorandum of Points and Authorities by Counsel Amicus Curiae.

My apology for requesting the indulgence of the court, briefly, at this time, is the interest of clients whom I represent in cases pending before the United States Circuit Court and Circuit Court of

Appeals; aside from the vital importance of the question involved as a general proposition in mining law, the decision here pronounced may be controlling at the hearing of those cases; in them, as in the case at the bar, reliance is placed by both court and counsel upon the decision of this Honorable Court in Calhoun G. M. Co. vs. Ajax G. M. Co., 182 U. S. 499.

I.

Nature of the Controversy.

The facts disclosed by the record show, as will hereafter more fully appear, that the tunnel location upon which respondent relies is junior to the lode locations of petitioner; that is, the date of the tunnel location is several days later than the date of the lode claim discoveries of mineral as fixed in the location certificates thereof, upon which the patent issued.

Respondent, in the trial court, undertook, notwithstanding the issue of patent, to introduce oral evidence for the purpose of attacking the lode locations by attempting to show that no mineral had been discovered at the time the location certificates were filed, or at any time until after the location of the tunnel site. But the trial court, accepting the law of the Ajax and other cases without qualification, rejected this evidence. On appeal the Circuit Court of Appeals, in reversing the judgment, held the evidence so rejected to have been admissible.

This Honorable Court, in deciding the Ajax case, and in discussing a similar offer of proofs, says:

> "An assignment of error is based upon an offer of plaintiff in error to prove that at the time of the location of the Ithaca Tunnel Site no ore had been discovered in the two patented claims of the defendant in error, to-wit, the Monarch and the Mammoth Pearl. The ruling was right *The patents were proof of the discovery and related back to the date of location of the claims; the patents could not be collaterally attacked.* This has been decided so often that a citation of cases is unnecessary."

At first blush it would seem that the offer of proof touching the discovery of mineral in the patented claims and the approval of such offer by the Court of Appeals are inconsistent with the foregoing clear and emphatic declaration of law by this court. But the learned judge who wrote the Court of Appeals opinion distinguishes between the two cases; he holds that the language employed by Your Honors in the Ajax case must be construed with reference to the facts there shown; and that that decision is, therefore, only authority for the proposition that the patent is conclusive as to the discovery of mineral at the date of entry; that the tunnel locator may challenge the original location and show that no mineral had been discovered at the date therein specified. And counsel, upon the hearing in this court, are urging with great earnestness and vigor the correctness of this view of the law and interpretation of the Ajax opinion.

But I most respectfully urge that there are two all-sufficient and conclusive answers to the position thus taken—

1st: The proposition above quoted, laid down by this court in the Ajax case and previously sanctioned by other courts and law writers, to the effect that the patent relates back to the location (that is to the acts of location including the discovery of mineral *as shown* in the patent proceedings) and is conclusive upon all such questions as the date of the discovery of mineral, is applicable to the case at bar. With all due respect to the court pronouncing the decision under review, I firmly believe that the general proposition laid down without limitation by Your Honors in this instance is strictly in accord with recognized legal principles touching the scope, effect and conclusiveness of United States patents to mining lode claims.

2nd: But another and, to my mind, all sufficient and conclusive answer to counsel's argument and to the position of the court below, is that respondent, by failing to adverse petitioner's application for patent, has waived its right to now raise this question.

Upon the first of these subjects Governor Thomas and the other counsel associated with him have left nothing for me to say. Their printed arguments are so lucid, strong and persuasive that it would be presumption on my part were I to attempt to add anything. I will, therefore, both in this brief and at the oral argument, limit myself to

the second proposition. And even in this I am embarrassed by the feeling that what I shall say may turn out to be only cumulative.

II

Failure to Adverse, Decisive

First: The following facts are shown by the pleadings and record in this cause:

That the tunnel location *was attempted* to be made in the manner prescribed by land office regulations and recognized by the courts; this means, among other things, that a notice was posted at the face of the tunnel, that the line of the tunnel for its full length was run and staked on the surface, and that a location certificate containing proper recitals was filed with the Clerk and Recorder —Lindley on Mines (2d Ed.) Sec 472; also that such location was made for the purpose of developing veins or lodes and discovering mines.

That the line of the tunnel was laid across petitioner's claims, and the tuunel was eventually extended through those claims for the distance of 625 feet; that at the time of such tunnel location respondent neither owned nor controlled any veins or lodes on the line of the tunnel beyond petitioner's territory—the "Black Jasper" referred to in the pleadings not being even *discovered* till five years later; that at no time did respondent ever discover any blind veins within the territory of petitioner—the only blind veins alleged to have been cut by

the tunnel being a long distance beyond petitioner's territory and in no manner appearing therein.

That the tunnel location was made or attempted to be made on the 13th of January, 1892; that the patent proceedings for the lode claims of petitioner were not instituted till several months thereafter, and patent entry was not made until the 5th of August, 1893.

Thus, it conclusively appears by the record that over eighteen months elapsed between the date of the tunnel location and petitioner's lode claim entry for patent. Respondent must have known of the existence of the lode claim locations and of the proceedings for patent; no fraud or deception appears to have been in any manner practiced, and respondent had ample time and opportunity to file its adverse in the Land Office on behalf of the tunnel location and begin its adverse suit. It deliberately chose to stand by and do nothing. Instead of proceeding under the adverse statute especially provided for such purposes, to challenge the regularity of petitioner's locations and the date of discovery of mineral in connection therewith, it allowed petitioner to proceed to patent without the slightest objection or protest. Whether such inaction on the part of respondent was due to the fact that when petitioner's proceedings for patent were pending, and at the time entry was made, *no blind vein had been discovered in the tunnel*, of course I do not know. But, as I view the law, neither such fact nor the other fact,

above mentioned, that respondent then possessed no vein beyond petitioner's territorry *to be developed by its tunnel*, was a sufficient excuse for the failure to adverse.

Second: Even a cursory examination of the mining laws of Congress will satisfy any one that it is the evident purpose of their framers to have tried and determined *prior to the issuance of patent*, so far as possible, through adverse proceedings, all questions pertaining to the conflicting claims of third parties or to the regularity of claimants' acts, upon which acts the patent is based. And a recognition of this purpose is just as important where the contesting party relies upon a tunnel location as where he relies upon a lode or placer location. There is quite as much reason for requiring all such questions to be adjudicated prior to patent in one instance as in the other.

In an adverse suit brought on behalf of a tunnel location substantially the same contentions will naturally arise as in such a proceeding between lode locations. The tunnel owner may challenge the citizenship of the locator, the discovery of mineral, and performance of the other acts necessary to a valid lode location, as well as the expenditure upon the claim of five hundred dollars by the applicant for patent; on the other hand, defendant in the adverse suit may dispute the regularity of the tunnel site location, and may put upon proof *its priority* and the reasonable diligence of its owner in running the tunnel.

As we will presently see, the courts have held that while an adverse is necessary for a blind vein already cut in the tunnel, it is not necessary for a tunnel owner to adverse the lode patent application *for blind veins* which have not been and may never be discovered in the tunnel. But this is no reason why all the matters above mentioned, preliminary to patent may not be presented and tried upon a tunnel adverse *for the right of way.*

I use the phrase "right of way" for want of a better term to describe the interference and conflict resulting from the location of the tunnel site and construction of the tunnel. As a matter of fact, this expression does not adequately describe such conflict. The term "right of way" is defined to be an easement or interest in land appurtenant to the dominant estate; "it is classed as an incorporeal hereditament lying in grant." In very many instances it consists merely of the privilege possessed by a third person of passing over the servient estate, and is used in common by the owner of that estate and its possessor.

As used in connection with the subject now under consideration, however, it is much more comprehensive. There is, of course, some interference with the surface in performing certain of the acts of location. The line of the tunnel has been defined to be a strip on the surface the width of the tunnel – usually about ten feet, (Corning Tunnel Co. v. Pell, 4 Colo. 508—see also Morrison's Mining Rights 9th ed. p. 195 et seq.); this strip must,

under land department regulations, be surveyed and plainly marked by stakes and monuments for the entire distance. But the main feature of the tunnel right of way is *the appropriation of territory for the bore of the tunnel;* this means *the absolute appropriation and exclusive enjoyment and use in the present case of a cubical strip of territory at least ten feet in height by ten feet in width, and 625 feet in length;* it carves out of the servient estate—the lode location—such large piece of ground and deprives the owner of that estate of the same and of all dominion thereover; and it may prove to be a very serious interference with the development of his property according to his own wishes and plans.

Thus the tunnel right constitutes a servitude and interest such as is equaled only by the most sweeping, exclusive and permanent rights of way recognized in the books; it is a conflict or interest involving the ownership and control of territory; it subtracts to an important extent from the fee conveyed by patent; it is a physical diminution of the territory covered by the lode location; in this respect it cannot be distinguished in principle from the physical interference with and taking away of territory by the successful contestor owning a conflicting surface lode location.

Moreover, as we will presently see by reference to the federal statutes, this kind of a conflict or adverse claim is of such a nature as to present not the slightest difficulty in the action or suit required to be brought in support of an adverse

claim; it is a present, tangible and certain interest; its nature, boundaries and extent are as easily described as are the nature, boundaries and extent of a conflict between surface mining locations; a mining engineer will encounter but little, if any, more difficulty in determining these matters in one instance than in the other; and it requires no argument to show that a jury will have no more trouble in determining the right to possession of such right of way than in determining the right to possession of a surface piece of territory covered by conflicting locations.

I challenge counsel to produce a single valid reason, based either upon principle or upon physical conditions, for denying the necessity of the tunnel owner's filing and litigating his adverse under circumstances like those in the case at bar. And I confidently assert and will endeavor to show, that both the federal statutes and the decisions are not only in perfect harmony with, but when properly understood fully sustain my contention in this regard.

III.

The Federal Statutes Recognize an Adverse for Tunnel Right of Way.

Tunnel locations are authorized by and derive their force and effect from Section 2323, Revised Statutes of the United States. This section reads, *inter alia:*

> "Where a tunnel is run for the development of a vein or lode or for the discovery of mines, the owners of such tunnel shall have the right of possession of all veins or lodes within three thousand feet from the face of such tunnel on the line thereof not previously known to exist, discovered in such tunnel, to the same extent as if discovered from the surface; * * "

The fundamental purpose of this provision is to give the tunnel owner the blind veins discovered in the tunnel; but it has been made the basis of quite elaborate tunnel site location regulations, and quite a system of tunnel rights, obligations and limitations.

Your Honors have construed this section in conjunction with the preceding section, which relates to lode claims, and have recognized and applied the *principle of priority*, permeating the whole mining law, both national and state. That is to say, this court has held that it was the intention of Congress by this statutory provision to confer the benefits specified in conjunction with tunnel locations, only upon such tunnel locations as *are prior in time* to the conflicting lode locations. In the Ajax case above mentioned you declare that--

> "There is no implication of the displacement of surface locations made before the commencement of the tunnel. Indeed there is a necessary implication of their preservation. And there can be no implication of a conflict with the rights given by Section 2323. The exclusiveness of these rights we have declared. The

tunnel can only be run in subordination to them."

As to the correctness and meaning of this portion of the Ajax opinion there is no dispute in the present controversy.

But Section 2322 mentioned, makes a full, complete and exclusive grant of all veins having their tops or apexes within the boundaries of surface lode locations projected vertically downward, as well as to the country rock or adjacent territory within such boundaries. And the construction given by Your Honors declares, in effect, that *a junior tunnel locator acquires no rights whatever by virtue of Section 2323, in a senior lode location.* There is nothing in the statute or in the interpretation given by this court to the statute, that sanctions a trespass of any kind by the junior tunnel locator upon the senior lode location. *To acquire any rights whatever, and to avoid being a mere trespass,* the tunnel location must have been prior in time to the conflicting lode location. It is clear that by this provision Congress did not intend to confer upon *a junior tunnel locator a right of way through a senior lode location,* any more than that body intended to give blind veins to the tunnel owner under such circumstances.

That a tunnel location is a *mining claim* within the meaning of the law will not admit of dispute; it has been frequently held to be such. And involving as it does a right of way through lode locations lying across the line of the tunnel, it cannot

be doubted that the tunnel is an *adverse* mining claim.

The mining adverse statute (Section 2326) is as follows:

> "Where an adverse claim is filed during the period of publication, it shall be upon oath of the person or persons making the same and shall show the nature, boundaries and extent of such adverse claim, and all proceedings except the publication and notice, and making and filing of the affidavit thereof shall be stayed until the controversy shall have been settled or decided by a court of competent jurisdiction or the adverse claim waived. It shall be the duty of the adverse claimant within thirty days after filing his claim to commence proceedings in a court of competent jurisdiction to determine the question of the right of possession and prosecute the same with reasonable diligence to final judgment; and a failure so to do shall be a waiver of his adverse claim. * * "

It will be noted that the "adverse claim" is not confined to a *surface* conflict. A surface conflict is nowhere in any manner alluded to. The language is "an adverse claim"; to say that such claim is limited to a surface conflict is to amend the statute; it is to read into the statute something that does not appear therein. The phrase "adverse claim" is broad enough to cover any claim that in any manner diminishes the applicant's ownership of or dominion over the territory applied for. Why should the courts amend the statute by placing a limitation thereon? When they have said that the

"adverse claim" must be "a present, tangible and certain right," I submit, they have gone far enough. But, as already declared and hereinafter more fully shown, the right of way of a senior tunnel location for the tunnel, fulfills in every respect this requirement. And when we consider the added fact that the conflicting tunnel claim is one that can be easily and fully determined in the adverse suit, there would seem to be no excuse for excluding this class of claims from the purview of the statute.

Inasmuch as counsel for respondent place some reliance thereon, (See printed brief pp. 7 and 8). I ought perhaps, in passing, to notice that portion of said Section 2326 which entitles the successful party in the adverse suit to file a certified copy of the judgment roll with the register and proceed to patent the territory previously in conflict.

That provision doubtless applies to those cases where the adversing plaintiff represents the kind of a mining location for which a patent is necessary to convey title. But no patent or other instrument is necessary to convey title to the territory covered by or included within the bore of the tunnel under a proper tunnel location; the statute itself so operates as to complete and perfect the exclusive right to possession of such territory, just as it does to complete and perfect the exclusive right to blind veins discovered in the tunnel; no other title is provided for in either case. A surface location of such blind veins is pronounced by this and other courts to be wholly unnecessary; Ellet v. Camp-

bell, 18 Colo. 521, 167, U. S. 119. To make a surface location of a blind vein so discovered, if it were possible, and proceed to patent thereon, would be procuring a patent to that which the patentee already owns by title substantially equal to a title in fee from the United States. It would be entirely useless for the successful tunnel contestant to avail himself if he could, of this patent entry provision of Section 2326. And I need hardly repeat to Your Honors that it is uniformly held that if the blind vein is discovered in the tunnel prior to patent proceedings, the tunnel owner *must* adverse or forfeit his interest therein.

I submit that the Federal Statutes will be searched in vain for anything inconsistent with the view that respondent should have filed its adverse and have litigated in the adverse suit the priority of its location. I respectfully urge that these statutes, when fairly and reasonably construed, imposed upon respondent the duty to do so.

IV.

Decisions in Harmony with the Foregoing Proposition.

Not only does the foregoing view harmonize perfectly with the federal statutes, but it is not inconsistent with any of the decisions save that of the Circuit Court of Appeals in the case at bar. The cases that refer to tunnel adverses are few, and I will briefly consider them.

So far back as 1881 the Commissioner of the General Land Office, in the Tioga-Bodie controversy, 8 Copps L. O. 88, held that a tunnel location was a mining claim, and sustained the necessity for an adverse, by the tunnel owner, of a conflicting lode claim patent application; although in that case no blind vein had at the date of such application been discovered in the tunnel.

Afterwards, upon appeal, the Secretary of the Interior held that a tunnel location is a "mining claim," and that if it conflicts with (i. e. intersects) a lode location, it is an "adverse claim" within the meaning of the statutes. And besides sustaining the necessity of filing an adverse he approves the holding of the Commissioner:

> "That it was necessary for the rights of the tunnel company that suit should have been brought in court as provided by Section 2326, Revised Statutes, and that as said company failed to institute such proceedings its adverse claim was waived, and that it cannot be adjudicated by this department."
>
> Bodie T. & M. Co. v. Bechtel C. Mg. Co. and Tioga C. M. Co., 1 L. D. 586, 587.

The opinion is well considered; the existence of tunnel rights, and the power, as well as the duty to vindicate those rights through the statutory adverse and adverse suit, are emphatically declared. And because of the failure to file the adverse or to prosecute the adverse suit, the learned Secretary declined to allow the Bodie

Company's request and make the grant to the lode claims under the patent, subject to the alleged claims of the tunnel company.

Again, the Secretary of the Interior, as late as 1899, upheld a tunnel adverse where the tunnel does not appear to have discovered any blind veins either in the conflicting lode claims sought to be patented, or beyond; the adverse claim being "to recover all that parcel of the Sangre de Christo Tunnel & Tunnel Site embraced within the lines of the survey of the Ella W. and Mary A. claims." *Inter alia*, the learned Secretary says:

> "A tunnel location under the laws of the United States is a mining claim and may be made the basis of an adverse claim. * * This being so, the filing of an adverse claim in the local office and the commencement of suit thereon in the District Court will operate as a stay of all proceedings upon Burton's application for patent until the controversy shall have been settled by a court of competent jurisdiction, or the adverse claim waived, unless the applicant for patent has excluded from his application the land covered by the adverse claimant, in which event he may take a patent for the remainder."
>
> Byron B. Burton 29 L. D. 235, 236.

The patent application in that case was filed in 1894; afterwards and in 1898, in the "application to purchase," the line of the tunnel and a portion of the "tunnel site" were expressly excluded; but as a certain tract "for dumping purposes," was included in the original adverse claim, the learned Secre-

tary declined to allow the patent entry till this claim was adjudicated in the pending adverse suit. Such adverse suit is still undetermined.

In Back v. Sierra Nevada C. M. Co., 2 Idaho 386, the court is discussing this subject under similar conditions; that is to say, where no vein has been discovered in the tunnel, and at the time of patent application the tunnel owner does not appear to be the owner of a vein or lode beyond the conflict territory, which the tunnel is run to develop. In the progress of such discussion, the court, at page 391, says:

> "The rights of the tunnel locator being created by statutory enactment, the courts should be, therefore clothed with power to protect such rights, and we are unable to see how they can be fully protected but by permitting such locator to avail himself of the provisions of Section 2326. Doubtless it was the legislative will that he should have such privilege. Such being the case, we must hold that a tunnel location constitutes a mining claim within the meaning of the statute, as was held by Commissioner Kirkwood. * * And that it is such a claim as may be asserted and protected under the provisions of Section 2326 Rev. St. U. S. and the act amendatory thereof. While this appellant would have no right under his complaint *to have a patent issued to him*, since he *does not claim to have discovered any vein or lode*, yet we think he has the right of possession for prospecting purposes to the area in dispute and to show that respondent's location was made upon the line of his tunnel."

In Hope Mining Co. v. Brown, 11 Montana 370, the bore of the tunnel under consideration had not reached the territory of the lode claim applicant for patent, yet since the lode claim intersected the line of the tunnel, the court recognized the necessity for an adverse, and sustained the same.

I only refer to this case, however, on the general proposition that a tunnel location should adverse. The ruling is put by the court upon what in my judgment is an incorrect basis. The ownership of a right of way for the tunnel is not considered either by court or counsel. The decision rests upon the fact that the intersecting lode claimant has found a blind vein in his territory that will probably be cut in the tunnel when the bore thereof has been sufficiently advanced. In the light of those decisions holding that it is not necessary to adverse for blind veins that may not exist or may never be cut (discovered?) in the tunnel, this specific ground was not sufficient alone to sustain the adverse suit; or to justify the granting of the temporary injunction therein against the patent proceeding. Had the opinion rested upon the *necessity to adverse for the tunnel right of way, and the trial of the adverse suit been ordered to proceed at once*, it would, I think, have been impregnable.

The case of Corning T. Co. v. Pell, 4 Colo. 507, which is sometimes referred to as inconsistent with the theory that the tunnel locator should ad-

verse the conflicting lode claim application for patent, is, for a number of reasons, not pertinent to the present inquiry. The subject of the tunnel right of way was not there considered. The court held that the "line of the tunnel" was a strip ten feet wide; that a lode "location" is simply the discovery shaft; and that since the Slide discovery shaft was not within the ten foot strip constituting the line of the Corning tunnel, there was no conflict and the adverse proceeding must fail. In view of the more modern decisions of this and other courts, including the Supreme Court of Colorado itself, comment upon the Corning case in unnecessary.

I do not comment upon the case of Glacier Mining Company v. Willis, 127 U. S. 471, which holds that ejectment may be maintained for the veins and territory included within a prior tunnel site location; my reason for not doing so is that the tunnel site location there under consideration and the rights obtained through such location were based solely upon mining rules and regulations; no act of congress, not even that of 1866, on the subject of mining rights having been adopted at the date of said location.

The case of Ellet v. Campbell, 18 Colo. 510, and 167 U. S. 119 is perfectly consistent with the view I am advocating. Those decisions simply hold that a senior tunnel location owner who has discovered a blind vein in the tunnel should adverse a junior lode claim application for patent,

the location of which is based upon a subsequent discovery of the same vein from the surface. No attention is given, in fact *no attention is necessary* under the circumstances, to the question the *right of way*. The prior location of the tunnel, and the prior discovery therein of the blind vein, were amply sufficient *alone* to sustain the adverse suit. The case is, however, authority for the necessity of filing an adverse under such circumstances, and where *no surface location of the blind vein is made.*

I come lastly to the Enterprise-Rico-Aspen case, 66 Fed. 200 and 167 U. S. 108. This case is the main reliance of counsel for respondent in discussing the subject of tunnel adverses. At page 12 of the printed brief filed in the Circuit Court of Appeals, they say, referring to it,—"This, so far as we are able to find, is the only authority in the Federal Courts upon the question relative to tunnel site claimants and lode claimants in respect to adverse proceedings." They then quote elaborately from the opinion and undertake to apply the conclusion reached to the case at bar. And, basing their question upon a supposed similarity between the two cases, they ask—"What right was possessed by plaintiff in error (the tunnel owner) in this case, at the time of the application for patent by defendant in error (the lode claimant), which would have entitled it to institute an adverse proceeding?"

The answer to this question is self-evident even upon a superficial reading of the Rico-Aspen case. Upon this vital point there is a radical dis-

tinction between the two cases. This difference I will try to make so plain by a reference to the facts and conclusions announced, that any extended comment will be superfluous.

The Rico Aspen case holds it to be the duty of the senior tunnel owner to present in connection with the lode application for patent, and litigate, his adverse claim to a blind vein already discovered in the tunnel. But it further holds that if no such blind vein has been discovered, the tunnel owner need not adverse the patent application; (*his reliance was based alone upon his right to blind veins*). The Circuit Court of Appeals, at page 209, says, among other things:

> "The law does not require an impossibility of any man, it does not require him to know the unknown, or to demonstrate that which is incapable of proof; and we are of the opinion that the owners of this tunnel ought not to be and were not estopped from enforcing the rights guaranteed to them by the Act of Congress because they did not make and maintain their claim to those rights at a time when it was impossible for them to establish them and when no one knew that they existed."

But in that case—unlike the case at bar—the Vestal claim referred to, *did not intersect the line of the tunnel; it was parallel to the tunnel and 500 feet distant therefrom; and the tunnel, no matter how far projected, would never have conflicted with or passed into the territory of the lode claimant;* therefore the

subject of a *right of way through the lode claim was not and could not have been involved.* There was not, and could never be, any conflict of territory; either from the location and staking of the tunnel line on the surface, or from the extension of the bore of the tunnel through the Vestal claim, below the surface. But the court does say:

> "There is no doubt that the object of these provisions (adverse sections) of the act of Congress is to require the conflicting claims *of all parties* to be adjusted before the patent issues, *so far as that can justly be done at the time the application for patent is made.*"

This language is too plain to be misunderstood and I submit that had the Vestal claim *intersected the line of the tunnel*, and had the subject of the *tunnel right of way* through such claim *been presented*, the court would have reached a different conclusion as to the necessity for an adverse. It would no longer be the case of requiring a man "to know the unknown, or to demonstrate that which is incapable of proof;" it would be the case of requiring him to comply with the statute by presenting *a well known and substantial adverse claim* and demonstrating by proof *its present, certain existence.* I submit that it would be a case where all such questions as the date of the discovery of mineral could "justly be presented at the time the application for patent is made."

But the Rico-Aspen decision, upon which I have just been commenting, was reviewed by this

Honorable Court. That decision was here affirmed. In the course of the affirming opinion, written by Mr. Justice Brewer, and at page 115 of the report, (167 U. S.) I find the following language:

> "Now at the time the application for patent to the Vestal claim was presented and proceedings had thereon, the defendant knew of no vein which would enable it to dispute the right of the owners of the Vestal to a patent. The Vestal claim, it will be perceived, *runs parallel to the line of the tunnel and is distant therefrom some five hundred feet.* The presumption, of course, would be that the vein ran lengthwise and not crosswise of the claim as located, and such a vein would not, unless it radically changed its course, *cross the line of the tunnel.* Whether it did or not, or whether any other vein should be found in the tunnel which should cross the territory of the Vestal *was a matter of pure speculation* and there would be no propriety in maintaining a suit to establish defendant's inchoate right and delay the Vestal claimants in securing a patent on a mere possibility *which might never ripen into a fact.*"

The above italics, as well as the italics in other quotations made in this brief, are mine.

Why does this Honorable Court emphasize, by a specific reference thereto, the facts that the Vestal claim lay parallel to the line of the tunnel five hundred feet away, that the Vestal vein or veins unless they changed their course would never cross the line of the tunnel, and that whether any

vein to be found in the tunnel would cross the Vestal claim was a matter of pure speculation? The plain inference, it seems to me, is, that if the tunnel line had intersected the Vestal claim, the conclusion might have been different. This court might, in such case, of its own motion, have recognized the conflict of territory occasioned by the tunnel line on the surface and by its bore below the surface; even though counsel might have limited their argument to the discovery of blind veins. The very language employed by this court lays especial stress upon the fact, as did the language of the Court of Appeals, that the question of a right of way for the tunnel was not and *could not have been presented* or considered. The *tunnel claim solely relied upon* in that case was the subsequent possible discovery of a vein which, changing its presumptive course and after leaving the territory of the Vestal claim, might intersect the line of the tunnel and be (discovered) found therein.

But Your Honors clearly, it seems to me, sanction my position touching the necessity for an adverse in cases like the present, when you employ the following language, beginning at the bottom of page 115 of the report:

> "The obvious contemplation of the law in respect to these adverse proceedings is that there shall be *a present, tangible and certain right, and not a mere possibility.*"

If these words mean anything—and Your

Honors would not use meaningless language—they mean that if the tunnel owner, through his tunnel location, acquired "a present, tangible and certain right" in the lode claim that is proceeding to patent, he must file his adverse and set up and have adjudicated such right. But a right of way for his tunnel, including as we have seen the absolute appropriation of and exclusive dominion over a strip of land in the lode claim from ten to twelve feet in height and width and hundreds of feet in length, is a present and surely a most tangible and certain right; it is, as already observed, such an interest or claim as can readily be presented and adjudicated in the adverse suit. I submit there is no difference in principle, so far as this question is concerned, between the ownership of such a tract of territory below the surface and of a piece of ground of equal area upon the surface. It is just as important and desirable to have such a conflict below the surface adjudicated prior to patent as it is to have the surface controversy so determined.

These observations apply with equal force to certain language employed by the Court of Appeals in deciding the case at bar. The learned judge who wrote the opinion, referring to the facts shown in this case, at page 167—119 Federal—says:

> "It (respondent) was neither acquired to become such a party (to adverse proceedings) nor to submit its claims and interests in the lands to the adjudication of that department at that time, because its rights

> therein were then too uncertain, contingent and intangible to admit of determination. When the applications for the patents for the lode claims were filed, the blind veins which have induced the use of the tunnel through the lands in controversy, had not been discovered, the tunnel had not been driven into the land, and it was impossible to know whether or not the claimant of the tunnel site would ever acquire a right to use the land for the purpose to which it is now devoted. The claimant of a tunnel site is not required by Sections 2325 and 2326, Rev. St. * * to file an adverse claim and submit his rights in the lode claims it crosses to adjudication by the Land Department upon the filing of applications for patents to those claims when his rights are at that time uncertain, contingent and intangible. * * It (respondent) was not required to file an adverse claim and to submit its rights to the adjudication of that department when applications for the patents were made."

No one can read this language and not be impressed with the facts: First that the court was not contemplating or considering the question of the appropriation of a tract of territory for the bore of the tunnel; and, second, that if it had been contemplating this question it would not have said that respondent was not required to file an adverse claim; it could not have declared such a right and interest to be "too uncertain, contingent and intangible for determination." A careful examination of that opinion will show that, throughout, the

attention of the court is directed *solely to the discovery of blind veins;* and that the specific proposition I am here urging was entirely overlooked by that august tribunal.

Mr. Morrison, in the 9th edition of his valuable work on mining rights, beginning at page 195, deals with the subject of tunnel sites and considers the cases bearing thereon. Upon this specific branch of the subject, at page 202, he says:

> "The Land Office in the decision above cited held that a tunnel *must* adverse to protect its tunnel rights; but we apprehend that a patent granted across the line of the tunnel would not effect the rights of such tunnel so far as its easement of right of passage is concerned."

The fact, however, that Mr. Morrison's mind is unsettled, and that he regards the subject *as an open question* under the decisions, is shown by the sentence he employs immediately following the above quotation. He says;

> "But it is safer to either adverse or procure a deed from the applicant for the right or territory clouded by the application."

I am aware of the fact that Mr. Lindley, at Section 730 of his work on mines, under the head "Underground Conflicts," says:

> "An application for patent invites only such contests as effect the surface area. A possible union of veins underneath the surface cannot be foreshadowed at the time the application is made. When such

> a condition arises it is adjusted by reference to surface apex ownership and priority of location not involving any surface conflict. The rule is well settled that conflicting adverse rights set up to defeat an application for patent cannot be recognized in the absence of an alleged surface conflict. Prospective underground conflicts or questions involving extralateral rights are not the subject of adverse claims."

This language, by such a distinguished writer cannot be lightly treated. Were it not for circumstances which appear in the text and foot notes, the statement would be entitled to serious weight.

But in the first place, we must consider that Mr. Lindley is simply stating the construction of the adverse statute so far as interpreted by the decisions at the time the paragraph was written. He is not attempting himself to give a complete interpretation to this statute, nor to express his personal view as to its scope or effect. Moreover, Mr. Lindley is discussing the subject solely with reference to lode claims. His mind, as shown by the language used is directed to a certain class of underground conflicts, viz: The *intersection and union of veins on their dip*—a class of conflicts or conditions that has thus far only challenged attention in connection with surface lode locations; and as to which *the Federal Statute itself (Sec. 2322) expressly legislates*, by declaring that the ore at the point of intersection or below the point of union of such veins shall belong to the senior location; thus giving express statutory sanction to the view adopted by the

courts that as to this specific class of territorial conflicts no adverse is required.

As is clearly demonstrated by his discussion and by the authorities cited, Mr. Lindley was not there considering and did not dream of considering the point I am now urging upon the attention of Your Honors. At Section 490a he does refer, however, to the subject of a right of way for tunnels through lode locations. And he emphatically announces and endorses the proposition that a junior tunnel locator is not entitled thereto through a senior lode location; that the law, including the decisions, *does not recognize any such privilege, and that a state statute attempting to confer the same would be unconstitutional and void.*

So I say, without fear of successful contradiction, that said Section 730, notwithstanding its unqualified language, was not intended to cover the subject now under discussion; and that it cannot be regarded as an expression either of Mr. Lindley's private views thereon, or as a statement by him of judicial rulings with reference thereto.

Respectfully submitted,

J. C. HELM,

Amicus Curiæ.